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January 17, 2020

VIA ELECTRONIC FILING

The Honorable Jocelyn Boyd
Chief Clerk/Executive Director
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, SC 29210

Re: **Notice of Generic Workshop on Filing Requirements for Integrated
Resource Plans**
Docket No. 2019-224-E. Duke Energy Carolinas, LLC ("DEC")
Docket No. 2019-225-E. Duke Energy Progress, LLC ("DEP")

Dear Ms. Boyd:

I am writing in response to SELC's letter dated January 17, 2020. In that letter, SELC makes a variety of arguments, including (1) that an allowable ex parte briefing is improper, and (2) that a generic docket is appropriate for resolution of filings requirements related to the IRP. I address each in turn below.

An allowable Ex Parte briefing on this matter is appropriate. SELC argues that "A party giving an allowable ex parte briefing is prohibited from requesting or suggesting that the Commission take any particular course of action. But the Commission's stated purpose in holding this generic workshop is to 'hear from interested stakeholders regarding suggestions for filing requirements for Integrated Resource Plans under Act 62.'" SELC misstates the law. S.C. Code Ann. § 58-3-260(C)(6)(a) makes clear that no commitment, predetermination, or prediction of commissioner action can be requested or given. There is nothing contrary to the law for utilities to provide information as to how they intend to satisfy the filing requirements for IRPs as set out in detail in Act 62. There is nothing contrary to the law for any other party to provide their view, in an allowable ex parte briefing, how they interpret the requirements laid out in Act 62, and SELC and other parties are free to do just that. Nothing about those topics requires a commitment, predetermination or prediction from the Commission. As such, an allowable ex parte briefing is the most appropriate forum in which the Commission could hear from interested parties.



A generic docket cannot take the place of the promulgation of regulations. Act 62 provides very detailed filing requirements for IRPs. Almost 1,000 words were added to the IRP statute with the passage of Act 62. The legislature gave clear filing requirements in enacting Act 62. Utilities have the burden of meeting those filing requirements. It is unclear what SELC intends to result from a generic docket, but a generic docket cannot bind the utilities nor serve in lieu of a rulemaking. In fact, it is clear that any further delineation of the IRP statute should follow the rulemaking process, as S.C. Code Ann. § 58-37-40 specifically provides in (E) that “The commission is authorized to promulgate regulations to carry out the provisions of this section.” What is unlawful is for the Commission to create guidelines in lieu of promulgating regulations. Of course, if there is a generic docket the Companies are happy to participate in it, but not to the extent that it supplants the rulemaking process.

If SELC intends that any guidelines issued in a generic docket are to be binding on all utilities, that creates a serious Administrative Procedures Act (“APA”) S.C. Code Ann. § 1-23-110. The Commission does not have the authority to establish filing requirements in addition to those articulated in Act 62 summarily in a generic proceeding that would apply to all electric utilities in advance of them ever making an application required under Act 62. In order to establish rules applicable to all similarly situated entities, like all investor-owned utilities, the APA would require a rulemaking proceeding with rules proposed by the Commission and subject to review by the General Assembly. In *Home Health Services v. SC Tax Commission*, 312 S.C. 324, 440 S.E.2d 375 (1994) the SC Supreme Court held that when an agency promulgates a rule intended to create a “binding norm” that rule must be issued following the rule-making provisions of the APA. The *Home Health* case distinguished agency statements that are simple policy statements. Whether a particular agency proceeding announces a rule or a general policy statement depends upon whether the agency action establishes a binding norm. *Ryder Truck Lines, Inc. v. United States*, 716 F.2d 1369 (1983). These issues were also addressed in more detail in the Companies’ July 5, 2019 filing on similar matters. That filing was made in these dockets, and is incorporated by reference and attached hereto.

It remains Duke Energy’s intent to be transparent and provide the Commission and interested stakeholders with its views on how it intends to comply with the requirements for IRPs as laid out in Act 62. Written comments or an allowable ex parte briefing are both suitable and lawful paths to provide the Commission that information. A generic docket in lieu of promulgating regulations is not.



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Thank you for your consideration of our views.

Yours truly,

Frank R. Ellerbe, III

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cc via email:

Parties of Record in Dockets 2019-224-E, 2019-225E, 2019-226-E & 2019-227-E
Heather Shirley Smith, Deputy General Counsel
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July 5, 2019

VIA ELECTRONIC FILING

The Honorable Jocelyn G. Boyd
Chief Clerk/Administrator
Public Service Commission of South Carolina
101 Executive Center Drive, Suite 100
Columbia, South Carolina 29211

RE: Duke Energy Carolinas, LLC and Duke Energy Progress, LLC's Response to South Carolina Coastal Conservation League, Southern Alliance for Clean Energy, South Carolina Solar Business Alliance, Inc. and Johnson Development Associates, Incorporated's Comments Regarding Procedural Schedule for the 2019 and 2020 Integrated Resource Plan Filings Filed Pursuant to S.C. Code Ann. Section 58-37-40. Docket Nos. 2019-224-E and 2019-225-E

Dear Ms. Boyd:

Duke Energy Carolinas, LLC and Duke Energy Progress, LLC (the "Companies") respectfully respond to the comments filed by the Southern Alliance for Clean Energy and the South Carolina Coastal Conservation League collectively, "SACE/CCL") in the above-referenced dockets on June 19, 2019 ("SACE/CCL Comments"), as well as the comments filed by the South Carolina Solar Business Alliance, Inc. ("SCSBA") and Johnson Development Associates, Inc. ("Johnson Development") in the above-referenced dockets on that same date ("SCSBA/Johnson Development Comments"). SACE/CCL, Johnson Development, and SCSBA are collectively referred to herein as "Requesting Parties."

By way of background, on June 13, 2019, a letter was issued in the above-referenced dockets instructing the electrical utilities, the Office of Regulatory Staff ("ORS"), and any other interested parties to file their proposed procedural schedules related to Integrated Resource Plans ("IRPs") filed pursuant to S.C. Code Ann. § 58-37-40 on or before June 19, 2019. Accordingly, on June 17, 2019, the Companies filed a letter in the above-referenced dockets describing their proposed procedural schedule which includes keeping the schedule for the updated IRPs later this year, and filing the comprehensive IRPs in compliance with S.C. Code Ann. § 58-37-40 on September 15, 2020.¹ As described above, SACE/CCL, along with Johnson Development/SCSBA filed comments on June 19, 2019 recommending the Commission open a generic docket to

¹ The Companies filed a clarifying letter on June 19, 2019, in those same dockets.

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establish “uniform set of IRP requirements”² and “Integrated Resource Planning procedures and guidance”³ reflecting the statutory requirements of Act 62.

From the Companies’ point of view, the IRP-related portion of Act 62 (as to comprehensive and update filings) was perhaps the least controversial portion of Act 62. The Companies believe this to be in part because much of the concepts and collaboration on future IRP planning began as part of the South Carolina Energy Plan process, and those concepts can easily be seen from the discussion in the Plan and its Appendices to the recently enacted law.⁴ The Companies have continually participated in discussions and been collaborative, over a number of years, in what ultimately has been codified into Section 58-37-40, as amended by Act 62.

For the reasons explained below, the Companies object to this request by the Requesting Parties. Establishing IRP requirements through Commission-issued “guidelines” would be inconsistent with the procedural framework established by the Commission in Section 58-37-40(C)(1), resulting in duplicative proceedings addressing the same subject matter. Further, should the Commission determine that additional IRP rules are necessary, it should issue such rules consistent with Section 58-37-40(E), the Administrative Procedures Act, and the Commission’s rules and regulations.⁵

The Legislature, through Act 62, has already provided a specific uniform set of IRP requirements. Section 58-37-40, as amended by Act 62, provides a comprehensive, enumerated list of information that electrical utilities must include in their IRPs, thoroughly articulating the requirements necessary to fulfil the statutory obligations. In fact, the Legislature provided such extensive guidance to the electrical utilities and the Commission about the content of the IRP, the criteria by which the Commission must evaluate the IRP, and the procedural nature of that evaluation, that it expanded the prior version of Section 58-37-40 **by almost 1,000 words.** The Companies agree with the July 5th comments filed by Dominion Energy South Carolina Inc. (“Dominion SC”) that once comprehensive IRPs are filed (September 15, 2015 for DEC and DEP and February 28, 2020 for Dominion SC), the Commission, the Office of Regulatory Staff, the Requesting Parties and other interested parties can review the proposed IRPs and assess whether each utility has complied with the extensive statutory guidance included in Act 62 to determine the sufficiency for the IRPs and whether the statute has been satisfied. As such, establishing a

² SCSBA/Johnson Development Comments at p. 2.

³ SACE/CCL Comments at p. 2.

⁴ See *South Carolina State Energy Plan* pp. 18, 69-70. Retrieved from <http://www.energy.sc.gov/files/Energy%20Plan%2003.02.2018.pdf>; and *Appendices* pp. 6, 8-9, 35-37. Retrieved from <http://www.energy.sc.gov/files/Energy%20Plan%20Appendices%2003.02.2018.pdf>. IRP Subcommittee documents, found at <http://energy.sc.gov/energyplan/irpplanning>.

⁵ See S.C. Code Ann. Section 58-37-40. (“The commission is authorized to promulgate regulations to carry out the provisions of this section”).

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separate proceeding at this time for “guidelines” is not only unnecessary, but procedurally deficient.

In the interest of judicial economy and effectuating the express wording of Act 62, the Companies should be allowed to file their IRPs according to the statute’s explicit and detailed requirements, and intervenors should be allowed to provide comments on the “reasonableness and prudence of the plan and alternatives to the plan” as provided for in Section 58-37-40(C)(1). The Legislature has specifically instructed the Commission to establish a procedural schedule to allow for such intervenor participation. Act 62 is clear that this intervenor participation occurs **after** the filing of the IRPs.⁶ Additionally, the Commission has been provided 300 days to evaluate the comprehensive IRP once filed and issue an order approving, modifying or denying the plan.⁷ This timeline provides more than adequate time for the Commission to consider whether the utilities require any more guidance beyond the substantial direction included in Act 62.

Moreover, Section 58-37-40(C)(3) clearly provides a remedy if an electrical utility does not comply with the specific requirements of the statute, stating that:

[i]f the commission modifies or rejects an electrical utility’s integrated resource plan, the electrical utility, within sixty days after the date of the final order, shall submit a revised plan addressing concerns identified by the commission and incorporating commission mandated revisions to the integrated resource plan to the commission for approval. Within sixty days of the electrical utility’s revised filing, the Office of Regulatory Staff shall review the electrical utility’s revised plan and submit a report to the commission assessing the sufficiency of the revised filing. Other parties to the integrated resource plan proceeding also may submit comments. Not later than sixty days after the Office of Regulatory Staff report is filed with the commission, the commission at its discretion may determine whether to accept the revised integrated resource plan or to mandate further remedies that the commission deems appropriate.

Accordingly, opening a generic docket in advance of the filing of the IRP to establish a “uniform set of IRP requirements” through Commission-issued “guidelines” is not the best use of parties’ efforts, particularly as it would result in duplicative proceedings, given that Act 62 requires these

⁶ See S.C. Code Ann. Section 58-37-40(C)(1) (“The commission shall establish a procedural schedule to permit reasonable discovery **after** an integrated resource plan is filed in order to assist parties in obtaining evidence concerning the integrated resource plan, including the reasonableness and prudence of the plan and alternatives to the plan raised by intervening parties.” (emphasis added)).

⁷ See S.C. Code Ann. Section 58-37-40(C)(1).

Notwithstanding the above, if the Commission desires to implement additional rules regarding Section 58-37-40, such rules should be adopted pursuant to a rulemaking proceeding, as described in Section 58-37-40(E). The Commission is empowered to promulgate regulations under S.C. Code Ann. § 58-27-150, which provides that, “[t]he Commission may make such rules and regulations not inconsistent with law as may be proper in the exercise of its powers or for the performance of its duties under this chapter, all of which shall have the force of law.” The path for a Commission rulemaking for such rules and regulations is governed by the S.C. Administrative Procedures Act (“APA”), S.C. Code Ann. § 1-23-10 *et seq.*, and under S.C. Code Ann. Regs. § 103-818, which provides as follows:

A. Nature of Rulemaking Proceedings. When permitted by law, and upon the filing of a pleading, proceedings for the purpose of rulemaking shall be conducted by one or more Commissioners or by a hearing examiner through the development of a formal record.

C. Conduct of Rulemaking Proceedings.

(2) General notice of proposed rulemaking proceedings shall be made in accordance with applicable provisions of law.

D. Final Disposition of Rulemaking Proceedings. Rulemaking proceedings shall be concluded upon the issuance of an order by the Commission issuing, amending, or repealing a rule or rules, and containing a concise general statement of the basis and purpose of such rule or rules.

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Publication of such rule or rules shall be made in accordance with applicable provisions of law.

Further, the APA, provides as follows: “‘Regulation’ means each agency statement of general public applicability that implements or prescribes law or policy or practice requirements of any agency. *Policy or guidance issued by an agency other than in a regulation does not have the force or effect of law.*”⁸ The APA also specifies that “[p]romulgation’ means final agency action to enact a regulation after compliance with procedures prescribed in this article.”⁹ S.C. Code Ann. § 1-23-110 provides the procedures for the notice and public participation requirements for proposed regulations. Finally, according to the S.C. Supreme Court, whether a particular agency proceeding announces a rule or merely a general policy statement depends upon whether the agency action establishes a binding norm.¹⁰

To the extent the Commission established a uniform set of IRP requirements through “guidance” as proposed by the Interested Parties, such requirements would amount to a “binding norm” that would require adherence by the Commission to the formal rulemaking process. Otherwise, not only would the issuance of such guidance be inconsistent with the authorization to “promulgate regulations” as provided for in S.C. Code Ann. § 58-37-40(E), but the guidance would not have the force or effect of law. Only once promulgated under the APA and under the Commission’s rulemaking regulations would such rules become effective.

The Companies respectfully request that the Commission require the utilities to file their comprehensive IRPs according to the utility-proposed schedules in a manner that complies with the abundant guidance given in Act 62. Once filed, the intervening parties can develop positions on the sufficiency of such information through discovery and testimony, in the manner the Legislature specifically set forth in Section 58-37-40(C)(1). At that time, the Commission will be provided a record upon which it can evaluate the sufficiency of the comprehensive IRP as set forth in Section 58-37-40(C)(2). Conducting an initial proceeding to adjudicate the same issues that will be presented to the Commission through the statutorily-required IRP proceeding would be entirely unnecessary and a waste of very limited resources. If, after that time, the Commission deems that a rulemaking would be appropriate, then that would be the optimum time to establish such a rulemaking. Accordingly, the Companies respectfully request that the Commission deny the Requesting Parties’ request.

If you have any questions about this matter, please do not hesitate to contact me.

⁸ See S.C. Code Ann. § 1-23-10(4) (emphasis added).

⁹ S.C. Code Ann. § 1-23-10(5).

¹⁰ See *Home Health Service, Inc. v. S.C. Tax Comm’n*, 312 S.C. 324, 329 (1993).

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Sincerely,

A handwritten signature in blue ink that reads "Heather Shirley Smith". The signature is written in a cursive, flowing style.

Heather Shirley Smith

cc: Andrew M. Bateman, Office of Regulatory Staff
Nanette S. Edwards, Office of Regulatory Staff
Jeffrey M. Nelson, Office of Regulatory Staff
Becky Dover, SC Department of Consumer Affairs
Carri Grube-Lybarker, SC Department of Consumer Affairs
Heather Shirley Smith, Duke Energy Corporation
K. Chad Burgess, Dominion Energy South Carolina, Inc.
Matthew W. Gissendanner, Dominion Energy South Carolina, Inc.

**Duke Energy Carolinas, LLC and Duke Energy Progress, LLC
Proposed Procedural Schedule**

Docket Number	Docket Description	Procedural Schedule/Notes
2019-185-E (DEC) 2019-186-E (DEP)	Proceeding to Establish Standard Offer, Avoided Cost Methodologies, Form Contract Power Purchase Agreements, Commitment to Sell Forms, and Any Other Terms or Conditions Necessary (Includes Small Power Producers as Defined in 16 United States Code 796, as Amended) - S.C. Code Ann. Section 58-41-20(A)	<u>DEC/DEP Direct Testimony</u> (on the standard offer, avoided cost methodology, form contract power purchase agreements, and commitment to sell forms): August 14, 2019 <u>Intervenor/ORS Direct Testimony</u> : September 11, 2019 <u>DEC/DEP Rebuttal Testimony</u> : October 2, 2019 <u>Intervenor/ORS Surrebuttal Testimony</u> : October 11, 2019 <u>Hearing</u> : Week of October 21, 2019
2019-195-E (DEC) 2019-196-E (DEP)	Proceeding for the Commission to Establish Reasonable Guidelines to Ensure Reasonable Interconnection Timelines, Including Time Requirements to Deliver a Final System Impact Study to All Interconnection Customers that Execute a System Impact Study Agreement - S.C. Code Ann. Section 58-27-460-(D)	The Commission should request comment from interested parties by December 2, 2019.
2019-207-E (DEC) 2019-208-E (DEP)	Proceeding Related to S.C. Code Ann. Section 58-41-30 Related to Electrical Utilities and Their Current Voluntary Renewable Energy Program, and Such Other Proceedings Required By the Commission	DEC and DEP will file a letter with the Commission by August 2, 2019 notifying the Commission as to whether the Companies have a voluntary renewable energy program on file that conforms with the requirements of S.C. Code Ann. § 58-41-30. After reviewing this filing, which will address the Companies' voluntary renewable energy program pending in Docket No. 2019-320-E, the Commission should consider further a procedural schedule.
2019-210-E (DEC) 2019-211-E (DEP) 2019-180-E (generic)	Proceeding for the Commission to Review the Community Solar Programs Established Pursuant to Act 236 of 2014 and to Solicit Status Information on Existing Programs from the Electrical Utility S.C. Code Ann. Section 58-41-40 (B)(1)	DEC and DEP will file a report with the Commission by July 18, 2019 outlining the Companies' existing community solar programs and proposing any new community solar programs. The Commission should require updated reports on existing community solar programs and any proposals for new community solar programs by Dec. 9, 2019.
2019-182-E (generic)	Proceeding Initiated Pursuant to S.C. Code Ann. Section 58-40-20(C) to (1) Investigate and Determine the Costs and Benefits of the Current Net Energy Metering Program and (2) Establish a Methodology for Calculating the Value of the Energy Produced by Customer-Generators	No immediate further action is required by Act 62. DEC/DEP propose that Parties file with the Commission comments on a schedule and use of Technical Workshops proposed by Vote Solar by Dec. 2, 2019 for further Commission consideration and encourage interested parties to discuss and agree, if possible, on a schedule prior to the Dec. 2, 2019 filing.
2019-224-E (DEC) 2019-225-E (DEP)	Proceeding Related to S.C. Code Ann. Section 58-37-40 and Integrated Resource Plans	DEC and DEP will file updated IRPs this fall as scheduled and comprehensive IRPs compliant with Act 62 on Sept. 15, 2020. No rulemaking is required under Act 62 and it is premature to require one before the utilities are allowed to file IRPs compliance with Act 62.